

6159/USSN 10/692,857
Group Art Unit 1794

REMARKS

This is in response to the Office action mailed March 11, 2009.

Applicant has cancelled claims 1-10 and 16-21 without prejudice.

Applicant has amended claim 22 to more precisely define applicant's invention.

Applicant has added new claims 27 through 36 to include claims directed to preferred embodiments of applicant's invention.

The Examiner has rejected claims 1-15 (now pending claims 11-15) under 35 U.S.C. § 112, first paragraph, as failing to comply with the written description requirement. The Examiner states that claims 1 through 15 contain subject matter which was not described in the specification in such a way as to reasonably convey to one skilled in the art that the inventor, at the time the application was filed, had possession of the claimed invention. Specifically, the Examiner states at page 2 of the Office action that:

In the response filed 12/29/08, applicant amends claim 1 to add the limitation of "a base layer of non-liquid ingredient". The limitation is not supported by the original disclosure because the specification does not have any disclosure excluding liquid ingredients...

For the reasons set forth hereafter, applicant respectfully

requests that the Examiner reconsider and withdraw this rejection on the grounds that the specification fully complies with Section 112, first paragraph.

Section 112, first paragraph, provides in pertinent part that:

The specification shall contain a written description of the invention, and of the manner and process of making, and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art to which it pertains...to make and use the same...

In support of the rejection, the Examiner states that "the specification does not have any disclosure excluding liquid ingredients." This is incorrect. Specifically, the specification states at page 7, paragraphs 18 and 19, among other places, that:

A dough layer in a traditional pizza is generally a mixture that consists essentially of flour or meal and a liquid, such as water or milk, and is stiff enough to knead or roll.

Instead, the pizza of the present invention has a base layer which is comprised of a formulated flour (dry ingredients) and a cheese mixture...

Accordingly, the specification specifically teaches that the prior art pizza doughs included a liquid. The present invention, as set forth in the specification, states that the base layer includes a formulated flour (dry ingredients) and cheese mixture. Thus, formulated flour in dry form and

cheese are not a liquid. This is also in accord with the examples provided in the specification. Additionally, the optional ingredients to the base layer are non-liquids.

See, e.g., specification, pages 8-9, paragraph 20.

Accordingly, the specification clearly teaches one skilled in the art that the base layer of the claimed pizza or food product is of non-liquid ingredients. Reconsideration and withdrawal of the rejection is respectfully requested.

The Examiner states that "[c]laim 4 has the same problem as claim 1; the specification discloses tomato sauce which is not considered to be non-liquid food product because tomato sauce contains water." While claim 4 has been cancelled, this is incorrect. Claim 4 claims that the base layer of claim 1 further comprises at least one additional non-liquid food product. The specification specifically sets forth the food products which may be included in the base layer at, among other places, page 8, paragraph 20, and states that:

Optionally, another food product may be added to the base layer mixture. For example, a traditional meat topping, such as, but not limited to, pepperoni, sausage, bacon, ham or any combination thereof may be added to the base layer mixture...

Each of these components is a non-liquid ingredient. Thus, one skilled in the art would know that the claimed invention

may include in the base layer other non-liquid ingredients. The reference to tomato sauce in the specification at, for example, pages 9-10, paragraph 23, states that:

At least one additional layer may be added on top of the base layer mixture. The at least one additional layer is preferably selected from the group consisting of cheeses, meat toppings, poultry toppings, fish toppings, vegetables, fruits, other suitable toppings and any combination thereof. Tomato sauce, i.e., pizza sauce, may also be added as an at least one additional layer...

(emphasis added) Accordingly, the specification teaches that tomato sauce is not in the base layer. Clearly, one skilled in the art reading the specification fully understands that the base layer includes non-liquid ingredients. This is a reason the pizza does not have a traditional crust layer and why it is low in carbohydrates.

The Examiner further states that "[t]he same problem is noted in claim 5 because vegetables and fruits both contain water which would not be considered as non-liquid." While claim 5 has been cancelled, for the reasons set forth above for claims 1 and 4, the specification clearly teaches one skilled in the art that the base layer may be of non-liquid ingredients. Further, the Examiner's statement that vegetables and fruit would not be considered as non-liquid is without basis. Vegetables and fruit are

solids. It is elementary that there are three states of matter, namely gas, liquid and solid. See "States of Matter Glenn Research Center," National Aeronautics and Space Administration, ("matter normally exists as either a **solid, a liquid or a gas**" (original emphasis)), a copy attached hereto as Exhibit 1. Vegetables and fruits are solids. They are not liquids.

Further, liquids are defined in The American Heritage Dictionary Of The English Language as:

The state of matter in which a substance exhibits a characteristic readiness to flow, little or no tendency to disperse, and relatively high incompressibility.

A copy attached hereto as Exhibit 2. Vegetables and fruits are clearly not a liquid, they are a solid, and this is fully known to one skilled in the art.

The Examiner further states that "[c]laims 7-8 have the same problem as claims 4-5." While claims 7-8 have been cancelled, for the reasons set forth above for claims 1, 4 and 5, this is not correct.

The Examiner further states that "[c]laim 14 has the same problem as claim 5." For the reasons set forth above for claim 5, this is not correct. Reconsideration and withdrawal of the rejection of claim 14 is respectfully

requested.

The Examiner has rejected claims 1-15 under 35 U.S.C. § 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention. Specifically, the Examiner states at pages 2-3 of the Office action that:

In claim 1, the phrase "non-liquid ingredients" is indefinite because it is not known what would be considered as "non-liquid ingredients". It is not clear what is excluded or included from such phrase and the specification does not define what will constitute "non-liquid ingredients". The specification discloses the base layer comprises vegetables and fruits which are known to contain water; thus, it is not clear what is intended by "non-liquid food ingredients".

For the reasons set forth hereafter, applicant respectfully traverses the rejection and submits that claims 11-15 particularly point out and distinctly claim the subject matter which the applicant regards as his invention.

While the Examiner addresses claim 1 in the rejection, applicant will respond thereto with respect to claim 11. The claim language "a base layer of non-liquid ingredients" particularly points out and distinctly claims the subject matter of applicant's invention. As set forth above, the specification specifically discloses that the base layer is of non-liquid ingredients. The word "liquid"

is a term known to those skilled in the art as defined above by The American Heritage Dictionary Of The English Language and as known as one of the three states of matter. The sole basis provided by the Examiner in the rejection is that vegetables and fruits "are known to contain water".

Vegetables and fruits are solids, they are not liquids.

Additionally, even if vegetables and fruits are considered to be "liquid" materials, which they are not, the specification only teaches that these items may "optionally" be added to the base layer. In the claim, the base layer is defined as "a base layer of non-liquid ingredients consisting essentially of a dry formulated flour mixture and cheese." Thus, even accepting the Examiner's statement, which applicant does not, one skilled in the art, assuming he believed that a fruit or a vegetable was a liquid and not a solid, would know that the claimed invention in claim 11 does not include vegetables and fruits. For the foregoing reasons, applicant respectfully requests that the Examiner reconsider and withdraw the rejection of claims 11-15 under Section 112, second paragraph.

The Examiner has rejected claims 1 through 26 under 35 U.S.C. § 103(a) as being obvious to one skilled in the art at the time of the invention based on the "Lutein of

DreamPharm" excerpt articles relying on the recipes for "DEEP DISH PIZZA" and "Low Carb Pizza" in view of the Google Groups' reference to "www.netition.com" "KetoCrust". Applicant respectfully traverses the rejection.

As the Examiner is aware, it is incumbent upon the Examiner to set forth a prima facie case of obviousness. As set forth in the recent Supreme Court decision in KRS Int'l Co. v. Teleflex Inc., 127 S.Ct. 1727, 82 USPQ2d 1385 (2007), the Examiner must set forth what is disclosed in the prior art and compare the disclosure of the prior art to each of the claims which the Examiner has rejected. The Examiner must show why it would be obvious to combine the references relied upon by either showing some suggestion for combining the references within the references themselves or stating why it would be known to one skilled in the art to combine the references. The combined references must disclose the claimed invention. For the reasons set forth hereafter, applicant respectfully submits that the Examiner has not made a prima facie case of obviousness and the Lutein and Google references do not alone or in combination disclose or suggest applicant's claimed inventions.

In preface, applicant notes that the Examiner relies in part in the Section 103 rejection on the Section

112 rejection. For the reasons set forth above, the claim language is definite.

Additionally, the Examiner does not apply the references to each of the rejected claims. Rather, the Examiner makes a number of conclusory statements that it would have been obvious to one skilled in the art to combine the references, without stating why or where it would be obvious to combine the references and why the combined references disclose each of the inventions claimed in claims 11-15 and 22-26. Accordingly, it is difficult to respond to the Examiner's rejections as written in the Office action. Based thereon, applicant will hereafter set forth in detail the disclosures of the cited references and address the rejected claims.

Applicant respectfully disagrees with the Examiner's recitation of what is disclosed in the cited references. Therefore, applicant will address the cited references in detail.

The Lutein reference discloses four different recipes for pizzas, namely (1) "Crustless Pizza;" (2) "Diet-Right Pizzas;" (3) "DEEP DISH PIZZA;" and (4) "Low Carb Pizza." The Examiner relies upon the recipes for the Deep Dish Pizza and the Low Carb Pizza as discussed hereafter.

The Deep Dish Pizza disclosure is as follows:

DEEP DISH PIZZA

Ingredients:

4 oz. cream cheese
3 eggs
1/3 cup cream
1/4 cup grated Parmesan cheese
1/2 tsp. oregano
1/4 tsp. garlic powder 2 cups shredded mixed Italian cheese
1/2 cup low-carb (no sugar added) pizza sauce
1 cup shredded mozzarella

Pizza toppings of your choice: pepperoni, ham, green onion, green pepper, mushrooms, bacon, browned sausage or seasoned ground beef, additional parmesan.

How to prepare:

Preheat oven to 375 degrees. Beat together cream cheese and eggs until smooth; add cream, parmesan, and spices and mix again. Oil oblong casserole dish with olive oil or spray with PAM; sprinkle the Italian cheeses over the bottom of the dish and pour the egg mixture over. Bake for about 15 minutes; allow to stand for 5 minutes. Spread on pizza sauce, sprinkle mozzarella, and pile on your favorite toppings. Sprinkle with more Parmesan if desired. Return to oven and bake until bubble and browning. Allow to stand for 10 more minutes before cutting.

Accordingly, the crust of the Deep Dish Pizza consists of the Italian cheeses sprinkled over the bottom of the casserole dish upon which the liquid egg mixture is poured. The liquid egg mixture consists of beating together cream cheese and eggs until smooth, and adding cream, parmesan, and spices and mixing again. Thereafter, the base layer is cooked for 15 minutes. The sauce is then spread on the base layer and other toppings provided thereon. Thus, the base

layer comprises Italian cheese and the liquid mixture of cream cheese, eggs, cream, parmesan and spices.

The Low Carb Pizza cited by the Examiner is as follows:

Low Carb Pizza

Here's a dish that can stave off a pizza craving for low carb dieters or those who need to avoid wheat products. Zucchini or spaghetti squash work equally well for this crust, with spaghetti squash providing a somewhat sweeter flavor. Bake this in a traditional 9" pie pan, not a pizza pan.

This is a vegetarian recipe, but you could easily add whatever pizza toppings are your favorites, including pepperoni or sausage or other veggies.

3 cups grated raw zucchini
OR
3 cups cooked spaghetti squash
2 eggs, beaten
2 1/2 cups mozzarella cheese
1 1/2 cups tomato sauce
1/2 small onion, thinly sliced
1 small green bell pepper, chopped
1/2 cup sliced mushrooms
1/4 cup sliced black olives
1/2 cup grated Parmesan cheese
1 tsp. dried oregano
1 tsp. dried basil
1 Tbsp. olive oil

Serves 3-4. Preheat oven to 400F. Squeeze the excess moisture out of the grated zucchini or cooked spaghetti squash with paper towels. Mix the squash, eggs and 1 1/2 cups mozzarella together and press into the bottom of a pie pan. Bake for about 10 minutes. Remove the pan from the oven and spread the tomato sauce, vegetables or other pizza toppings and the remaining cheeses over the crust. Sprinkle with oregano and basil and drizzle the olive oil over the top. Bake for 25 minutes or until cheese is lightly browned.

Accordingly, this pizza has a pizza crust of either zucchini or spaghetti squash mixed with eggs and mozzarella. While the Examiner cites this reference at page 3 of the Office action, the Examiner does not apply the reference in the rejection at pages 3-5 of the Office action. Accordingly, it will not be addressed in detail herein.

The Google Groups' reference disclosure is minimal and states as follows:

www.netrition.com has KetoCrust which is a **low carb pizza crust**. It's tolerable, and a little on the spendy side. There are recipes for **low carb** crusts that use a little flour and some whey protein in a cook book I bought, but I haven't tried them, so I hesitate to recommend them right now.

(original emphasis) Accordingly, this reference apparently teaches a conventional pizza crust that uses, apparently, among other things, "a little flour and some whey protein." There is no disclosure as to what constitutes "a little" or what other ingredients are in the "cook book I bought" or how the pizza is made.

Notwithstanding the minimal disclosure of the Google Groups' reference, a combination of the Deep Dish Pizza recipe and the Google Groups' disclosure would provide for the following recipe:

1. Beat together cream cheese and eggs until smooth, add cream, parmesan, spices and a little flour and some whey protein, and mix again.
2. Oil oblong casserole dish with olive oil or spray with PAM;
3. sprinkle the Italian cheeses over the bottom of the dish and pour the liquid egg mixture over.
4. Bake for about 15 minutes; allow to stand for 5 minutes.
5. Spread on pizza sauce, sprinkle mozzarella, and pile on your favorite toppings.
6. Sprinkle with more Parmesan if desired.
7. Return to oven and bake until bubble and browning.
8. Allow to stand for 10 more minutes before cutting.

A combination of the Low Carb Pizza and Google

Groups' disclosure would be as follows:

1. Preheat oven to 400F.
2. Squeeze the excess moisture out of the grated zucchini or cooked spaghetti squash with paper towels.
3. Mix the squash, eggs, 1 1/2 cups mozzarella and a little flour and some whey protein together and press into the bottom of a pie pan.
4. Bake for about 10 minutes.
5. Remove the pan from the oven and spread the tomato sauce, vegetables or other pizza toppings and the remaining cheeses over the

crust.

6. Sprinkle with oregano and basil and drizzle the olive oil over the top.
7. Bake for 25 minutes or until cheese is lightly browned.

As seen hereafter, these combinations of references do not disclose applicant's claimed inventions.

Independent claim 11 claims as follows:

11. A crustless pizza without a traditional dough crust layer comprising:

a base layer of non-liquid ingredients consisting essentially of a dry formulated flour mixture and cheese; and

at least one food layer on top of said base layer, wherein said crustless pizza is lower in carbohydrates than a non-crustless pizza having a dough crust.

This claim is specifically directed to pizzas not having a traditional pizza crust. The claim requires a base layer of non-liquid ingredients consisting essentially of a dry formulated flour mixture and cheese. As seen above, the Deep Dish Pizza Recipe in combination with the Google Groups' reference does not teach these limitations. The Deep Dish Pizza when combined with the Google Group provides for a liquid mixture including cream and beaten eggs poured over the cheeses. This is contrary to the teaching of the invention of claim 11.

Further, claim 11 requires a base layer of non-

liquid ingredients consisting essentially of a dry formulated flour mixture and cheese. "Consisting essentially of" is a common transitional phrase in patent law requiring that the material ingredients in the mixture are the formulated flour mixture and cheese and precludes any other ingredients which materially affect the basic and novel properties of the invention. PPG Industries Inc. v. Guardian Industries Corp., 48 USPQ2d 1350, 1353-54 (Fed. Cir. 1998). With respect to claim 11, the Deep Dish Pizza reference when combined with the Google Groups' reference does not teach a base layer of non-liquid ingredients consisting essentially of a dry formulated flour mixture and cheese. Rather, it teaches a base layer of cheese and a liquid mixture including cream and beaten eggs. The ingredients of the Deep Dish Pizza of eggs, cream and cream cheese would clearly materially affect the base layer of applicant's claimed invention.

Applicant respectfully requests that the Examiner reconsider and withdraw the rejections of independent claim 11 on the grounds that the cited references do not teach one skilled in the art applicant's claimed inventions. For these same reasons, the rejection of dependent claims 12-15 must be withdrawn.

Applicant has added claims 27-36. These claims are similar to claim 11 and, in fact, are more detailed in defining applicant's invention. Accordingly, the cited references do not disclose or suggest these newly added claims.

Independent claim 22 claims the following method:

22. A method of making a crustless pizza without a traditional dough crust layer comprising the following sequence of steps:

preparing a dry formulated flour mixture comprising a high gluten flour and a baking powder;

distributing a pre-measured amount of said dry formulated flour mixture evenly onto a cooking pan;

distributing a pre-measured amount of a cheese evenly over said dry formulated flour mixture, wherein said dry formulated flour mixture and said cheese form a base layer;

distributing a pre-measured amount of a pizza sauce or a tomato sauce evenly over and on top of said base layer;

adding and distributing evenly a pre-measured amount of at least one food layer over and on top of said pizza sauce or said tomato sauce; and

baking said crustless pizza for a suitable time and at a suitable temperature, wherein said crustless pizza is lower in carbohydrates than a non-crustless pizza having a dough crust.

This claim claims a method following a specific sequence of steps. As discussed more specifically hereafter, the sequence of steps are not disclosed in the Deep Dish Pizza

recipe when combined with the Google Groups' reference as set forth above at pages 21-22. Thus, for example, this combination of references does not disclose first preparing a dry formulated flour mixture comprising a high gluten flour and baking powder. Rather, the combination of references cited by the Examiner disclose sprinkling Italian cheese over the bottom of a casserole dish and pouring the liquid egg mixture of cream, beaten eggs, cream cheese, parmesan, spices and a little flour and some whey protein onto the Italian cheeses and then baking the mixture. Thereafter, pizza sauce and other toppings are added. In the claimed method, the base layer is the dry formulated flour mixture and cheese. Accordingly, the method of claim 22 is not disclosed by the combination of the Deep Dish Pizza recipe and the Google Groups' recipe.


For the foregoing reasons, the method claimed in claim 22 would not have been obvious to one skilled in the art in view of the cited references. Reconsideration and withdrawal of the rejection is respectfully requested. Similarly, dependent claims 23-26 are allowable.

Reconsideration and allowance of the claims is respectfully requested.

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Respectfully submitted,

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Attachments: Exhibits 1 and 2